

No. 76-1131

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

**GEORGE PERKINS ECHOLS and
INTERNATIONAL THEATRES UNLIMITED, INC., PETITIONERS**

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT**

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

**WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.**

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Petitioners contend that their indictment should be dismissed because a film projectionist who exhibited petitioner's allegedly obscene films to the grand jury, although sworn as a grand jury witness, was not a person authorized to be present during grand jury deliberations by Fed. R. Crim. P. 6(d).

Petitioners were indicted in the United States District Court for the Eastern District of Louisiana on a three-count indictment charging them with transporting obscene films in interstate commerce, in violation of 18 U.S.C. 1462 and 2. Petitioners moved to dismiss the indictment on the ground that Lloyd Montreuil, the projectionist who exhibited the films to the grand jury,

was not authorized to be present during grand jury deliberations. Montreuil had been sworn as a grand jury witness and had showed the films to the grand jury after testifying that he was a qualified projectionist, that the projector was a complicated piece of machinery and that he was going to show the films in their entirety (Pet. App. 74a-75a). After the exhibition, he testified that he understood that the proceeding was secret and that he was not to discuss it with anyone (Pet. App. 76a).

The district court dismissed the indictment on the ground that Montreuil was not a "witness under examination" whose presence before the grand jury is authorized by Rule 6(d) (Pet. App. C; 413 F. Supp. 12).¹ The court of appeals reversed and held that Montreuil was a "witness under examination" within the meaning of the rule (Pet. App. A; 542 F. 2d 948).

1. The court of appeals' reversal of the district court's pre-trial dismissal of the indictment is essentially interlocutory and does not warrant further review. *Cobledick v. United States*, 309 U.S. 323; *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook Railroad Co.*, 389 U.S. 327. The court of appeals has placed petitioners in the same position as if the district court had denied their motions to dismiss in the first instance. Such a ruling would not have been appealable (28 U.S.C. 1291; see, e.g., *United States ex rel. Rosenberg v. United States District Court*, 460 F. 2d 1233 (C.A. 3)). At trial petitioners may be acquitted, in which case their claim will be moot.

¹Petitioners had originally been indicted on a seven-count indictment. Pending their motion to dismiss that indictment based on the allegedly unauthorized presence of Montreuil and an FBI agent, the government dismissed the indictment and obtained this superceding indictment.

If, on the other hand, petitioners are convicted and the convictions are affirmed on appeal, they will then be able to present their contentions to this Court by way of a petition for certiorari seeking review of the final judgment.

2. In any event, the court of appeals correctly decided that Montreuil was authorized by Rule 6(d) to be present at the grand jury proceedings. He was properly sworn as a witness and gave testimony as such. The fact that he did not testify as grand jury witnesses ordinarily testify is immaterial; witnesses are commonly utilized to present physical evidence and conduct physical demonstrations for grand juries and other tribunals. This Court has recognized that grand juries have broad powers to examine physical evidence and to call witnesses to produce such evidence. *United States v. Dionisio*, 410 U.S. 1; *United States v. Mara*, 410 U.S. 19. See generally *United States v. Calandra*, 414 U.S. 338, 343. The court of appeals correctly recognized that the grand jury, in the exercise of that power, is entitled to have the evidence "presented in an understandable and meaningful fashion" (Pet. App. 7a; 542 F. 2d at 952).²

²Petitioners claim (Pet. 7) that the projectionist could have instructed the prosecutor in the operation of the projector. But a grand jury is entitled to have evidence presented by a person competent to present it, and should not be subjected to the risks of delay, damage to evidence, or disjointed presentations of evidence, resulting from the inexperienced operation of the required machinery.

Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

APRIL 1977.